No. 96-7901

(5)

In The

Supreme Court of the United States

October Term, 1996

RICHARD F. TREST,

Petitioner,

vs.

BURL CAIN, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether, despite the State's failure to raise the affirmative defense of procedural default at any stage in the federal habeas corpus proceedings, the court of appeals is required to raise the defense *sua sponte* and is foreclosed from reviewing the claim on the merits based upon its conclusion that the claim is procedurally defaulted?

PARTIES TO PROCEEDINGS BELOW

Richard F. Trest, Petitioner

John Whitley, Warden, Angola State Prison

Burl Cain, Warden, Angola State Prison

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. State Trial Court Proceedings 2

B. State Post Conviction and Federal District Court Proceedings 2

C. The Decision Below 5

1. The Procedural Default Invoked *Sua Sponte* by the Court of Appeals 5

2. The Dissenting Opinion 7

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. THE COURT OF APPEALS ERRED IN INVOKING *SUA SPONTE* A PROCEDURAL DEFAULT AND REJECTING PETITIONER'S CLAIM ON THAT BASIS WITHOUT FIRST GIVING HIM NOTICE AND AN OPPORTUNITY TO ADDRESS THE ISSUE 10

II. THE COURT OF APPEALS WAS NOT REQUIRED TO RAISE *SUA SPONTE* PROCEDURAL DEFAULT AND, THUS, ERRED IN CONCLUDING THAT IT WAS FORECLOSED FROM ADDRESSING THE MERITS OF PETITIONER'S CLAIM ON THAT BASIS 13

TABLE OF CONTENTS – Continued

Page

A. Procedural Default Is An Affirmative Defense That Is Waived By The State's Failure To Assert It 13

B. A Federal Court Is Not Required To Raise A Waived Procedural Default Defense *Sua Sponte* Nor Is Precluded From Addressing The Merits Of The Claim On That Basis... 15

C. The Court of Appeals Was Not Foreclosed From Addressing Petitioner's Claim On The Merits Since The State Waived Any Procedural Default Defense..... 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Amadeo v. Zant, 486 U.S. 214 (1988) 14

Ford v. Georgia, 498 U.S. 411 (1991)..... 14

Bailey v. Cowley, 914 F.2d 1438 (10th Cir. 1990) 15

Barrera v. Young, 794 F.2d 1264 (7th Cir. 1986)..... 16

Beck v. Alabama, 447 U.S. 625 (1980)..... 14

Boykin v. Alabama, 395 U.S. 238 (1969)..... 5

Burgin v. Broglin, 900 F.2d 990 (7th Cir. 1990) 11

Castaneda v. Partida, 430 U.S. 482 (1977)..... 14

City of Canton, Ohio v. Harris, 489 U.S. 378 (1989) 14

County Court of Ulster County v. Allen, 442 U.S. 140 (1979) 18

Cupit v. Whitley, 28 F.3d 532 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1128 (1995) 15

Custis v. United States, 114 S.Ct. 1731 (1994)..... 5

Engle v. Isaac, 456 U.S. 107 (1982) 13

Esslinger v. Davis, 44 F.3d 1515 (11th Cir. 1995)..... 11, 12, 15, 16

Estelle v. Smith, 451 U.S. 454 (1981) 13

Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990) 16

Ford v. Norris, 67 F.3d 162 (8th Cir. 1995) 14

Gomez v. Acevedo, 106 F.3d 192 (7th Cir. 1996)..... 14

Granberry v. Greer, 481 U.S. 129 (1987).....17, 18

TABLE OF AUTHORITIES – Continued

Page

Gray v. Netherland, 116 S.Ct. 2074 (1996)..... 13

Hardiman v. Reynolds, 971 F.2d 500 (10th Cir. 1992)..11, 17

Harris v. Reed, 489 U.S. 255 (1989)..... 18

Henderson v. Thieret, 859 F.2d 492 (7th Cir. 1988), *cert. denied*, 490 U.S. 1009 (1989)..... 17

Hull v. Freeman, 932 F.2d 159 (3rd Cir. 1991) 17

Jenkins v. Anderson, 447 U.S. 231 (1980).....12, 13

Lambrix v. Singletary, 117 S.Ct. 1517 (1997) ...12, 14, 18

Merlo v. Bolden, 801 F.2d 252 (6th Cir. 1986), *cert. denied*, 480 U.S. 909 (1987)..... 15

Trest v. Whitley, 94 F.3d 1005 (5th Cir. 1996)..... 6

Washington v. James, 996 F.2d 1442 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 895 (1994).....11, 16

Wells v. Maass, 28 F.3d 1005 (9th Cir. 1994)..... 15

William v. Dixon, 961 F.2d 448 (4th Cir. 1991), *cert. denied*, 113 S.Ct. 510 (1992) 15

STATUTES

28 U.S.C. § 2241(c)(3)..... 1

28 U.S.C. § 1254(1) 1

MISCELLANEOUS

2 J. Liebman and R. Hertz, *Federal Habeas Corpus Practice And Procedure* (2nd ed. 1994)..... 18

OPINIONS BELOW

The court of appeals' decision is reported at 94 F.3d 1005, and is reproduced in the Joint Appendix (JA) at 88. The district court's unpublished judgment is reproduced at JA 84. The Louisiana Supreme Court's denial of review (580 So.2d 374) and the Louisiana district court's unpublished decision are reproduced at JA 24 and 27.

JURISDICTION

The court of appeals entered judgment on September 17, 1996 (94 F.3d 1005), and denied rehearing and rehearing *en banc* on October 29, 1996 (102 F.3d 552). JA at 99. The petition for a writ of certiorari was filed on January 27, 1997, and was granted in part on May 27, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2241(c)(3) provides that a writ of habeas corpus shall not extend to a prisoner unless "[h]e is in custody in violation of the Constitution or laws or treaties of the United States; . . . "

STATEMENT OF THE CASE

The Court's grant of certiorari was limited to the first question presented in the petition: whether, despite the

State's failure to raise the affirmative defense of procedural default at any stage in the federal habeas corpus proceedings, the court of appeals is required to raise the defense *sua sponte* and is foreclosed from reviewing the claim on the merits based upon its conclusion that the claim is procedurally defaulted.

A. State Trial Court Proceedings

In 1979, Petitioner, Richard F. Trest, was convicted of armed robbery in a Louisiana state court. Record at 25. Based upon his prior convictions in Mississippi state court, Petitioner was sentenced in Louisiana as a multiple offender to 35 years imprisonment without benefit of parole. Record at 25, 53, 55.

The Mississippi state court convictions that served as a predicate for Petitioner's enhanced Louisiana sentence arose from his 1976 plea of guilty to five counts of burglary. Record at 159, 171, 172. Petitioner was 18 years old at the time. Record at 159. Petitioner was sentenced to serve concurrent four year terms of imprisonment on the five counts and was released from prison in Mississippi in 1978. Record at 125. He did not appeal his Mississippi convictions or concurrent sentences, nor did he challenge the convictions in state post conviction proceedings in Mississippi.

B. State Post Conviction and Federal District Court Proceedings

On January 17, 1990, Petitioner, appearing *pro se*, filed a petition for post conviction relief (styled a "Motion

To Correct Illegal Sentence") in the Louisiana state court where he had been sentenced as a multiple offender. JA 3. Petitioner alleged in paragraph 7(B) of the Memorandum of Law in support of the petition that the trial court erred in using the prior Mississippi convictions to enhance his Louisiana sentence since at the time of his guilty pleas in Mississippi he had not been informed of his right to appeal or his right to counsel for appeal as guaranteed by the Sixth Amendment. JA 19. Petitioner also alleged that if the Mississippi felony convictions were "infirm by all of his constitutional rights being unknown to him or offered to him by the Mississippi court," then the Louisiana constitution prohibits their use for enhancement purposes. JA 20. The State did not file an answer to the petition.

On March 26, 1990, the trial court denied post conviction relief, concluding that Petitioner raised no substantive issues regarding the multiple offender proceedings and that "[h]is attack on the technical aspect of the proceedings lack merit." JA 24. The trial court did not specifically address Petitioner's claim that the Mississippi convictions were constitutionally infirm and could not be used to enhance the Louisiana sentence, nor did the trial court state, or even suggest, that it was relying on any procedural default on the part of Petitioner with regard to this or any other claim. On May 17, 1991, the Louisiana Supreme Court denied without opinion Petitioner's application for a supervisory writ or a writ of review from the decision of the trial court denying post conviction relief. JA 27.

On September 30, 1991, Petitioner, appearing *pro se*, filed a petition for a writ of habeas corpus in the United

States District Court for the Western District of Louisiana challenging the constitutionality of his Louisiana enhanced sentence on the bases alleged in his state post conviction petition. JA 28. In its Answer, the State did not specifically respond to the claim regarding the use of the Mississippi convictions, but did acknowledge that Petitioner had exhausted all of his claims. JA 56. *See also* State's Cert. Opp. at p. 2 ("The State of Louisiana shows that it believed petitioner had exhausted State remedies at the time he filed his Federal Habeas Corpus proceedings in the U.S. District Court, Shreveport, Division."). The State did not assert any state procedural bar to Petitioner's claims.

On February 2, 1994, the magistrate judge issued a Report and Recommendation that the petition for writ of habeas corpus be denied on the merits. JA 67. The Report and Recommendation did not specifically address Petitioner's claim concerning the use of the Mississippi convictions to enhance his Louisiana sentence. JA 73-74. The magistrate judge concluded with respect to the issue of exhaustion that "Petitioner has exhausted his state court remedies by application for post-conviction relief/writ of habeas corpus in the 26th Judicial District Court, and to the Louisiana Supreme Court which both denied him relief." JA 67.

On February 18, 1994, Petitioner filed an Objection to Magistrate's Report and Recommendation, noting that the Report failed to address the claim concerning the use of the Mississippi convictions to enhance his Louisiana sentence. JA 77. Petitioner further explained that the Mississippi convictions were constitutionally infirm in light of the trial court's failure properly to inform him, prior to

his guilty plea, of the constitutional rights he was waiving as well as the maximum sentence he could receive, in violation of *Boykin v. Alabama*, 395 U.S. 238 (1969). JA 79. Petitioner attached a copy of the transcript of his guilty plea in Mississippi state court. Record at 182-222.

On May 13, 1994, the district court denied the petition for a writ of habeas corpus for the reasons stated in the Report and Recommendation. JA 84. A timely notice of appeal was filed on May 26, 1994. Record at 231. On May 15, 1995, after the Petitioner, proceeding *pro se*, and the State had filed briefs, the court of appeals appointed counsel for the Petitioner for the purpose of filing a supplemental brief and for oral argument. JA 85. Further, by letter, the court ordered the parties to submit supplemental briefs specifically addressing the issue of *Custis v. United States*, U.S., 114 S.Ct. 1731 (1994). JA 86.

C. The Decision Below

1. The Procedural Default Invoked *Sua Sponte* by the Court of Appeals

On appeal from the denial of habeas corpus relief, the parties briefed the merits of Petitioner's claims. The parties' briefs did not address procedural default, which had, theretofore, not been a part of the case. Oral argument was held on December 7, 1995; no mention of procedural default was made by the parties or the panel members.

On September 17, 1996, a majority of a panel of the United States Court of Appeals for the Fifth Circuit

injected procedural default *sua sponte*, and without notice, into the case. On the basis of default, the panel affirmed the district court's denial of federal habeas corpus relief to Petitioner without reaching the merits of Petitioner's claim. *Trest v. Whitley*, 94 F.3d 1005 (5th Cir. 1996) (Jones and Stewart, J.J.) (Parker, J., dissenting). JA 88.

The majority concluded that it was precluded from reviewing the Petitioner's claim, which it described as a challenge to the constitutionality of his Mississippi convictions, because his petition raised claims that were "forfeited" and were "procedurally barred from appellate scrutiny." JA 88. Paradoxically, the majority found a procedural default based upon *Mississippi* post conviction rules and procedures, although the Petitioner was challenging a *Louisiana* enhanced sentence and was attacking his prior Mississippi convictions only insofar as they were used to enhance his *Louisiana* sentence.

Purporting to apply Mississippi law, the majority concluded that Petitioner was required to challenge the predicate Mississippi convictions in a petition for post conviction relief from the prior judgments of conviction no later than April 17, 1984, in Mississippi. JA 91. Since Petitioner failed to seek post conviction relief in Mississippi and was apparently time-barred from doing so, the majority concluded that his claim based on the unconstitutionality of the Mississippi convictions was procedurally defaulted. JA 94.

In reaching this result, the court ignored the fact that the State of Louisiana had never asserted the defense of

procedural default either in state post conviction proceedings or at any stage of the federal habeas proceedings in either the district court or the court of appeals. The majority also did not acknowledge that the Louisiana post conviction courts did not reject the claim on the basis of any alleged procedural default.

After raising procedural default *sua sponte*, the court concluded that "[t]he only potential remedies available to cure Trest's procedural default are to demonstrate either cause and prejudice for the default or that a fundamental miscarriage of justice will result from our failure to analyze his claims." JA 95. In this regard, the court criticized the Petitioner, stating:

> In the instant case, Trest neither alleges such cause and prejudice nor a fundamental miscarriage of justice; indeed, Trest has not even attempted to bear this burden. Hence, a federal district court in Louisiana cannot consider Trest's claims that his Mississippi convictions were somehow unconstitutional.

JA 95. The court failed to acknowledge, however, that Petitioner had no reason to allege cause and prejudice because procedural default had never been an issue in the case before the court's decision.

2. The Dissenting Opinion

Judge Robert M. Parker dissented, noting that "the state court adjudicating a habeas petitioner's claims must explicitly rely on a state procedural rule to dismiss the petitioner's claims." JA 97. Because the state courts in Petitioner's case did not do so, there was no procedural

bar to merits review of Petitioner's claim. JA 97. Furthermore, the dissent recognized that by failing to assert procedural default as a defense, the State waived the right to raise the defense. JA 97. The dissent reasoned further:

> In this case, the Louisiana court did not explicitly rely on the Mississippi statute of limitations, nor did the petitioner have the opportunity to rebut any resulting presumption. The majority's observation that Trest did not even attempt to bear his burden of establishing cause and prejudice is central to the flaw in their reasoning. How can this Court penalize Trest for failing to respond to the state's affirmative defense of procedural bar, when the State declined to raise such a defense?

JA 97.

SUMMARY OF ARGUMENT

In the course of over six years of litigation, the issue of procedural default was never raised by the State of Louisiana or any previous state or federal court presented with Petitioner's claim. Procedural default did not become an issue in the case until the panel majority, *sua sponte* and without prior notice, injected it into the case. The Petitioner was provided no opportunity to address the correctness of the court's conclusion that the claim was procedurally defaulted or to show cause and prejudice for the default. Under the circumstances, the majority's *sua sponte* and utterly unanticipated determination that Petitioner's claim was defaulted under Mississippi

law and that the court was foreclosed from considering it on the merits, without first giving the Petitioner prior notice and an opportunity to be heard on the issue, is fundamentally unfair. For this reason alone, the court of appeals decision must be reversed.

Furthermore, the majority erred in concluding that it was precluded from considering the merits of Petitioner's claim based upon its *sua sponte* invocation of a procedural default. This Court and the majority of courts of appeals to address the issue have concluded that procedural default is an affirmative defense that is waived by the failure of the State, as the party whose interests are at stake, to timely apprise the federal courts of the existence of the procedural default. While several courts of appeals have acknowledged that a federal court may raise *sua sponte* a procedural default not asserted by the State, no other court has concluded that merits review of a habeas claim is precluded on the basis of a waived procedural default.

The State of Louisiana never asserted the defense of procedural default and thus waived it. No Louisiana court relied on this defense in rejecting Petitioner's claim. There is thus no basis for the court of appeal's reliance on procedural default. The majority's conclusion that it was nevertheless precluded from addressing the merits of Petitioner's claim as a result of a waived procedural default that it raised *sua sponte* is contrary to the jurisprudence of this Court and the circuit courts and must be reversed.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN INVOKING *SUA SPONTE* A PROCEDURAL DEFAULT AND REJECTING PETITIONER'S CLAIM ON THAT BASIS WITHOUT FIRST GIVING HIM NOTICE AND AN OPPORTUNITY TO ADDRESS THE ISSUE

The issue of procedural default was never raised by the State of Louisiana or by any state or federal court until the court of appeals issued its opinion in this case. To the contrary, the parties litigated and the courts addressed Petitioner's claims on the merits. Nevertheless, the majority concluded that it was precluded from addressing the merits of Petitioner's claim based upon its *sua sponte* invocation of a procedural default and its determination that Petitioner had failed to establish cause and prejudice for the default. It did so without even acknowledging that Petitioner had no reason to allege or attempt to demonstrate cause and prejudice before the court's opinion issued.[1] The majority's conclusion, reached without first giving Petitioner any notice of its consideration of the issue or any opportunity to be heard, is fundamentally unfair and must be reversed.

Fundamental fairness demands that a federal court provide a habeas petitioner with notice and an opportunity to be heard on the issue of procedural default raised for the first time by the federal court *sua sponte*

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[1] As the dissent queried: "[h]ow can this Court penalize Trest for failing to respond to the state's affirmative defense of procedural bar, when the State declined to raise such a defense?" JA 97.

before adverse judicial action is taken. In *Esslinger v. Davis*, 44 F.3d 1515, 1528 (11th Cir. 1995), the Eleventh Circuit concluded that it is "fundamentally unfair for a court sua sponte to invoke a procedural default without giving the petitioner an opportunity to show cause for the default." In that case, the magistrate judge and the district court effectively "sandbagged" the petitioner by lulling him into believing that a procedural default would not be interposed as a bar to relief by first raising and then dropping the matter prior to an evidentiary hearing. *Id.* The court concluded that under the circumstances, and given the State's continuing waiver of the default, "basic fairness" required the magistrate judge to inform the petitioner prior to an evidentiary hearing of his intention to consider the default as a bar to relief. *Id.* *See also* *Washington v. James*, 996 F.2d 1442, 1444, 1447 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 895 (1994) (court of appeals, after raising procedural default defense *sua sponte*, found "no indication in the record of cause" for the petitioner's failure to raise his claim in state court and reversed on the basis of procedural default, rather than addressing the merits; significantly, however, court requested supplemental briefs from both parties on the issue of procedural default before reaching its decision); *Hardiman v. Reynolds*, 971 F.2d 500, 505 (10th Cir. 1992) (the court must give the petitioner an opportunity to respond to a defense of state procedural default raised *sua sponte* prior to a dismissal on that basis); *Burgin v. Broglin*, 900 F.2d 990, 995-996 (7th Cir. 1990) (based on counsel's admission at oral argument that petitioner was aware of evidence in support of his claim during the pendency of his state appeal, court denied claim on basis of procedural default

that was not raised by the State or addressed by the district court).

The court below gave the petitioner no notice of its consideration of procedural default. The Petitioner, not unreasonably, made no attempt to address a procedural default that he did not know existed until after the court had ruled against him. Like the petitioner in *Esslinger*, the Petitioner in the present case was effectively "sand-bagged" by the Court of Appeals.

In addition to offending notions of fundamental fairness and basic due process, the Court of Appeals' approach to the resolution of the issue of procedural default is at odds with the fact-based nature of the cause and prejudice inquiry. *Jenkins v. Anderson*, 447 U.S. 231, 234 n. 1 (1980). *See also Lambrix v. Singletary*, 117 S.Ct. 1517, 1523 (1997). The factual findings underpining a cause and prejudice determination should be made in the first instance by the district court. The Court of Appeals' cursory review of the record on appeal – a record that is devoid of any reference to procedural default – cannot substitute for the factual analysis the cause and prejudice inquiry demands.

The majority's conclusion that the Petitioner did not demonstrate the absence of a procedural bar or cause and prejudice for his default – when he had no reason for doing so based on the State's inaction and no notice of the need to make such a showing by the court of appeals – is contrary to the teaching of this Court regarding the nature of that showing and is fundamentally unfair. On this basis alone, the court of appeals' decision must be reversed.

II. THE COURT OF APPEALS WAS NOT REQUIRED TO RAISE *SUA SPONTE* PROCEDURAL DEFAULT AND, THUS, ERRED IN CONCLUDING THAT IT WAS FORECLOSED FROM ADDRESSING THE MERITS OF PETITIONER'S CLAIM ON THAT BASIS

A. Procedural Default Is An Affirmative Defense That Is Waived By The State's Failure To Assert It

This Court has consistently characterized procedural default as an affirmative defense and has placed the burden on the State, whose interests are at stake, to timely apprise the federal courts of the existence of the procedural default or see it waived. *See, e.g., Gray v. Netherland*, 116 S.Ct. 2074, 2082 (1996) (procedural default is "an affirmative defense for the Commonwealth;" thus, if the petitioner's claim was addressed at some stage of federal proceedings, "the Commonwealth would have been obligated to raise procedural default as a defense, or lose the right to assert the defense thereafter"); *Jenkins v. Anderson*, 447 U.S. at 234 n. 1 (1980) (in rejecting the State's procedural bar argument raised for the first time in this Court, the Court noted that "[o]rdinarily, we will not consider a claim that was not presented to the courts below," and thus did not consider the default). *See also Engle v. Isaac*, 456 U.S. 107, 124 n. 26 (1982) (*dicta*) (Court acknowledged that "[i]n some cases a State's plea of default may come too late to bar consideration of the prisoner's constitutional claim"); *Estelle v. Smith*, 451 U.S. 454, 468 n. 12 (1981) (in rejecting State's argument that the respondent waived his Fifth Amendment claim by failing to make a timely, specific objection, this Court noted that

State did not present the waiver argument in its petition for certiorari).[2] Moreover, this Court has recognized that the existence of a procedural default does not deprive the federal court of jurisdiction to decide the merits of the claim. *See Lambrix*, 117 S.Ct. at 1522.

The majority of the courts of appeals to address the issue have also concluded that procedural default is a defense that is waived by the State's failure to assert it in a timely manner. *See, e.g., Gomez v. Acevedo*, 106 F.3d 192, 196 n. 4 (7th Cir. 1996) (it is the State's obligation to assert a procedural default defense "in a manner reasonably calculated to alert the court;" otherwise, the defense is deemed waived); *Ford v. Norris*, 67 F.3d 162, 165 (8th Cir. 1995) (where the State asserted procedural default on

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[2] Placing the burden on the State as a party to federal habeas litigation to assert its own interest in a timely fashion is certainly not unusual. *See, e.g., Ford v. Georgia*, 498 U.S. 411, 420-21 n. 5 (1991) (Court notes that the State has never argued that petitioner's pretrial motion was inadequate to preserve the issue for review); *Amadeo v. Zant*, 486 U.S. 214, 228 n. 6 (1988) (failure of predecessor lawyer for State to dispute factual findings in lower federal courts constitutes a concession on the point); *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) (State's failure to inform this Court prior to grant of certiorari review that petitioner had arguably conceded point below does not provide basis for the Court to abstain from addressing the question before it); *Beck v. Alabama*, 447 U.S. 625, 630 n. 6 (1980) (State's failure to argue at any point that petitioner's presentation of his claim was insufficient as a matter of state law to preserve the issue constitutes the state attorney general's view of its own state's law that this Court "should not simply brush aside"); *Castaneda v. Partida*, 430 U.S. 482, 485 n. 4 (1977) (state official abandoned argument that defendant's challenge was not timely raised as a matter of state procedure in his petition for certiorari).

appeal for the first time, the bar is waived); *Esslinger v. Davis*, 44 F.3d 1515, 1524 n. 32 (11th Cir. 1995) (the State can waive a procedural bar to relief by explicitly waiving, or by merely failing to assert, the bar in its answer to the habeas petition); *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994) (state's failure to assert procedural default constitutes a waiver); *Cupit v. Whitley*, 28 F.3d 532, 535 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1128 (1995) (State waived procedural default by failing to object to petitioner's claim on that ground in its answer to the petition); *Bailey v. Cowley*, 914 F.2d 1438, 1439 (10th Cir. 1990) (although state courts refused to consider petitioner's claims on the merits because of a procedural default, State failed to raise the defense in federal court and it is thus deemed waived); *Merlo v. Bolden*, 801 F.2d 252, 255 (6th Cir. 1986), *cert. denied*, 480 U.S. 909 (1987) (when State did not expressly raise procedural default issue in state court, and state courts denied relief on the merits, the State waived the right to assert it in federal district court).

B. A Federal Court Is Neither Required To Raise A Waived Procedural Default Defense *Sua Sponte* Nor Is Precluded From Addressing The Merits Of The Claim On That Basis

In keeping with the equitable imperative to treat litigants on both sides of a lawsuit the same, the federal courts should apply a waiver of a defense as strictly against the State as they apply waiver doctrines against the habeas petitioner. *See, e.g., William v. Dixon*, 961 F.2d 448, 457 (4th Cir. 1991), *cert. denied*, 113 S.Ct. 510 (1992) ("finality, and its companion, waiver, must run along a two-way street;" thus, the State cannot raise new

defenses on appeal any more than the petitioner); *Falconer v. Lane*, 905 F.2d 1129, 1135 (7th Cir. 1990) ("waiver is not an obstacle reserved for habeas petitioners alone"). Moreover, it is inappropriate to deny relief on the basis of comity-based defenses given a State waiver. *See, e.g., Esslinger v. Davis*, 44 F.3d 1515, 1527-28 (11th Cir. 1995) ("In a given case . . . the state is in the best position to know whether, in the interest of justice, its rule needs – indeed, deserves – federal court vindication. Accordingly, when, as here, the state waives a habeas petitioner's procedural default in failing to obtain appellate review of a claim, the district court should assume that the waiver is justified."); *Barrera v. Young*, 794 F.2d 1264, 1269 (7th Cir. 1986) (if federal court refused to accept State's waiver of procedural default, whether explicit or implicit, "this would be a meddlesome intrusion into the state's internal allocation of governmental authority").

While several courts of appeals have nevertheless acknowledged that a federal court *may* raise *sua sponte* a procedural default not asserted by the State, no other court has concluded that a federal court is *required* to raise the defense *sua sponte* or that merits review of a habeas claim is precluded on the basis of a waived procedural default.[3] *See, e.g. Washington v. James*, 996 F.2d 1442, 1448 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 895 (1994) ("We believe that we may raise the procedural default

[3] Nor have any cases been found wherein a federal court, as did the court below, raised *sua sponte* a procedural default based upon the petitioner's failure to comply with the procedural rules of a state other than the state whose conviction and sentence are the subject of the habeas challenge and for which the petitioner is in custody.

issue sua sponte."); *Hardiman v. Reynolds*, 971 F.2d 500, 502 (10th Cir. 1992) ("[g]enerally, where the parties have not raised a defense, the court should not address the defense sua sponte;" however, where the doctrine implicates nonjursidictional values "that may transcend the concerns of the parties to an action, it is not inappropriate for the court, on its own motion, to invoke the doctrine"); *Hull v. Freeman*, 932 F.2d 159, 164 and n. 4 (3rd Cir. 1991) (although neither party raised issue of procedural default, "we think it appropriate for us to consider that issue sua sponte;" nevertheless, the court declined to rely on the procedural default given that it read the decision of last state court to address the claim to have denied it on the merits); *Henderson v. Thieret*, 859 F.2d 492, 498 (7th Cir. 1988), *cert. denied*, 490 U.S. 1009 (1989) (district court may raise the question of procedural default *sua sponte;* however, it may not raise and consider the issue where the state implicitly indicates a desire to waive the defense).

These courts of appeals have generally analogized to this Court's approach to a belatedly raised defense of nonexhaustion as set forth in *Granberry v. Greer*, 481 U.S. 129 (1987). In *Granberry*, the State interposed as a defense for the first time on appeal the habeas petitioner's failure to exhaust his state remedies. *Id.* at 130. This Court concluded that when the State fails, either inadvertently or otherwise, to raise an arguably meritorious nonexhaustion defense, the court of appeals "should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court

proceedings before reviewing the merits of the petitioner's claim." *Id.* at 134. However, it is important to note that in *Granberry*, that decision's delineation of situations in which federal court deferral pending state proceedings is appropriate despite the state's waiver or forfeiture of exhaustion all involved a federal court's protection of its *own* interests. *Id.* at 134-136.

Unlike the exhaustion doctrine, however, the procedural default doctrine protects only the interests of the States and not any interests of the federal courts. *See Lambrix*, 117 S.Ct. at 1522-23; *Harris v. Reed*, 489 U.S. 255, 265 n.12 (1989); *County Court of Ulster County v. Allen*, 442 U.S. 140, 152-54 (1979). State officials are necessarily in the best position to represent and reveal the interests of the state to the federal courts. *See* 2 J. Liebman and R. Hertz, *Federal Habeas Corpus Practice And Procedure*, § 26.2a, at 817 (and cases collected therein) (2nd ed. 1994). Thus, if a state official declines to assert a procedural default, the federal court shows no disrespect for the State's interest by reaching the merits of the petitioner's claim. *Id. Accord: Ulster County Ct. v. Allen*, 442 U.S. at 154 (1979). Accordingly, a State's waiver of a procedural default removes all bases for federal court reliance on the default, and the federal court should address the merits of a petitioner's claim.

C. The Court Of Appeals Was Not Foreclosed From Addressing Petitioner's Claim On The Merits Since The State Waived Any Procedural Default Defense

The State of Louisiana, the only party represented by a lawyer throughout this litigation, has never suggested

that Petitioner's challenge to his enhanced Louisiana sentence on the basis of the unconstitutionality of the predicate Mississippi convictions was procedurally barred. Furthermore, the State has acknowledged that Petitioner exhausted all of his claims in Louisiana post conviction proceedings. JA 56. The State's failure to raise the defense of procedural default at any time renders that defense waived. Like all other litigants in all other proceedings, the State should be required to raise any available defense at the earliest possible time, and its failure to do so should be strictly enforced.

Inexplicably, the majority opinion did not acknowledge the State's failure to assert a procedural default. Instead, having found a procedural default under Mississippi law, the court simply concluded that the default precluded its review of the merits of Petitioner's claim. JA 94. The opinion thus does not address the appropriateness of raising the defense *sua sponte* – given that the defense is designed to protect the interests of the State of Louisiana – based on the State's failure to assert it. The court of appeals' total disregard for the State's failure to raise the defense of procedural default, and the impact of that failure on the availability of the defense as an impediment to a merits review of Petitioner's claim, renders the opinion below fundamentally flawed.

The State of Louisiana had multiple opportunities in the state and federal courts to identify any interest it had in avoiding a ruling on the merits of Petitioner's claim on the basis of his failure to comply with Mississippi post conviction procedure and did not do so. The State's failure to raise the defense – which it has never suggested should be excused on any basis – certainly implies that

Louisiana has no interest in applying the procedural rules of another state in order to bar a merits review of Petitioner's claim.[4] Moreover, the Louisiana courts denied the Petitioner relief without ever suggesting that Petitioner's claim was procedurally defaulted because of his failure to seek post conviction relief from his Mississippi convictions in Mississippi court. Under the circumstances, there is no basis for the court of appeals' reliance on the procedural default.

The court of appeals clearly erred in concluding that it was foreclosed from addressing Petitioner's claim on the merits because of a procedural default it injected in the case *sua sponte* despite the State's failure to raise the defense at any time. This conclusion is contrary to the opinions of this Court and the circuit courts characterizing procedural default as an affirmative defense that is waived by the State's failure to assert it and must be reversed.

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[4] Nor does the Petitioner concede that Louisiana should have any interest in applying the procedural rules of Mississippi in a habeas proceeding challenging a Louisiana enhanced sentence sufficient to raise a procedural bar to Petitioner's claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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